SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-381

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ,

Petitioners,

VS.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Marshall Winokur and Rae Winokur, Abe Brodsky and Celia Brodsky, and Ethelle Katz and Bertha Katz pray that a Writ of Certiorari issue to review an order of the United States Court of Appeals for the Seventh Circuit, entered on May 18, 1973, dismissing an appeal from an order of the United States District Court for the Northern District of Illinois denying plaintiff class action status to the above entitled cause.

OPINIONS BELOW.

The order of the United States Court of Appeals for the Seventh Circuit dated May 18, 1973 is unreported and appears at A. 1.

The United States District Court for the Northern District of Illinois rendered its opinion on October 17, 1972. This opinion is reported at 58 F.R.D. 178 (N.D. Ill. 1972) and appears at A. 3.

JURISDICTION.

The order of the Court of Appeals was entered May 18, 1973 and a timely petition for rehearing with suggestion for *en banc* rehearing was denied on June 12, 1973.

Certiorari jurisdiction is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Whether an order denying plaintiff class status is appealable pursuant to 28 U.S.C. §1291 in a case in which the named plaintiffs' individual claims are so small that the absence of plaintiff class status makes further prosecution of the cause appear highly unlikely.

2. Whether the United States Courts of Appeal, in determining their jurisdiction over appeals from orders denying plaintiff class status, should recognize and apply the collateral order doctrine and the specialized application thereof relating to plaintiff class action status commonly referred to as the "death knell" doctrine.

STATUTE INVOLVED.

28 U.S.C. §1291 provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE.

In their complaint the plaintiffs alleged that the defendants (federally chartered Savings and Loan Associations) solicited funds by falsely advertising to the public that dividends equivalent to daily compound interest would be paid on deposits. Plaintiffs claimed that the advertising was false since the defendants actually calculated "interest" in such a manner that earnings were forfeited on withdrawals of money prior to the end of any calendar quarter. Plaintiffs further alleged that the advertising was false because the defendants omitted to state that deposits made after the 10th day of any month did not earn any dividends until the first day of the following month (although they widely advertised that deposits made by the 10th earned from the first of the month). In essence, defendants solicited deposits by claiming to pay daily compound interest and did not do so.

Plaintiffs alleged that the foregoing omissions are material to rational investment decision and, since savings accounts are securities, defendants had violated §10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5*

* Rule 10(b)-5, 17 C.F.R. §240.10b-5, reads as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

promulgated by the Securities and Exchange Commission. See *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967). Jurisdiction was based upon §27 of that Act and is not dependent upon the amount in controversy.

The individual monetary claims of plaintiffs do not exceed $12. This amount represents the "interest" lost from the plaintiffs' savings accounts on withdrawals made prior to the end of a calendar quarter and "interest" not paid on monies deposited in the 18 to 21 day period after the 10th of the month. The minuscule amount of individually claimed damages was reported to the lower court and was discernible from the passbooks and other papers filed in the district court.

On October 17, 1972 the district court entered an order denying plaintiff class status to the cause. The lower court stated that whether each class member had read the defendants' advertisements and been misled thereby, and whether each class member had learned of the interest actually payable, were individual questions which were essential to determine the materiality of the misrepresentations. The lower court concluded ". . . whether or not there has been a material misrepresentation is not a question common to the class but rather is a question to be answered by each individual member of the class." A. 5. Thus, the lower court reasoned, the commonness required by class action Rule 23(a)(2), F.R.C.P., was absent. The district court disclaimed any need to decide the extensively briefed question as to whether reliance was a necessary element of a Rule 10(b)5 claim (A. 6). Instead, the court posited a new concept—"individual materiality."

Thereafter, after plaintiffs' motion for a 28 U.S.C. §1292(b) interlocutory certification and for a finding pursuant to Rule 54(b), F.R.C.P., regarding the denial of plaintiff class status, was denied by the district court, a notice of appeal to the Seventh Circuit was filed on November 13, 1972.

After plaintiffs' Opening Brief in the Court of Appeals had been filed, defendants moved to dismiss the appeal for lack of jurisdiction upon the ground that the order denying plaintiff class status was not a final order under 28 U.S.C. §1291. Plaintiffs responded that such an order was a final order for purposes of §1291 under the "collateral order" and "death knell" doctrines of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2nd Cir. 1966), respectively. On May 18, 1973, in an order applicable to three separate appeals, the Seventh Circuit dismissed plaintiffs' appeal (A. 1).* By virtue of the May 18th order in the case at bar and the *per curiam* opinion in the *King* case (A. 11), the Seventh Circuit has wholly rejected the appealability pursuant to 28 U.S.C. §1291 of any district court order denying class status.

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* Since pursuant to Rule 29, Rules of the United States Court of Appeals for the Seventh Circuit, this order was not to be cited in the Circuit as precedent, on June 12, 1973, a *per curiam* opinion using substantially the same language as the May 18 order was issued in another class action appeal, *King* v. *Kansas City Southern Industries, Inc.*, No. 72-1734. (A. 11.)

REASONS FOR GRANTING THE WRIT.

I.

THERE IS CONFLICT AMONG THE CIRCUITS THAT HAVE CONSIDERED THE QUESTION: THE SECOND, FIFTH AND NINTH CIRCUITS ACCEPT THE "DEATH KNELL" DOCTRINE WHILE THE THIRD AND SEVENTH CIRCUITS REJECT THAT DOCTRINE.

Five circuits have now considered the question and sharp conflict has developed. Three circuits accept appeals from "final" orders denying plaintiff class status if it appears unlikely that the suit would be prosecuted as an individual action, and two circuits reject all such appeals and the "death knell" doctrine upon which such appeals are grounded. A discussion of the appealability doctrines involved and a listing of the cases follows.

A. Summary Of The Collateral Order And Death Knell Doctrines.

Section 1291 of 28 U.S.C. contemplates appeal to the Courts of Appeal only from "final decisions." The purpose of thus limiting appeals is to preclude piecemeal appeals, prevent harrassment of litigants and conserve judicial effort. See 9 Moore's Federal Practice, ¶110.07. Nevertheless, this Court has repeatedly held that §1291 is to be given a "practical rather than a technical construction" (*Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)), and that the danger of denying justice must be balanced against the inconvenience and costs of piece-meal review. (*Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-3 (1964)). "The Court has adopt-

ed essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final'. . . . A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure." *Brown Shoe Co., Inc.* v. *United States,* 370 U.S. 294, 306 (1962). Accordingly, this Court has not hesitated to review trial court rulings in cases not yet finally tried where those rulings were "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.,* 323 U.S. 373, 377 (1945); *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 153 (1964); *Land* v. *Dollar,* 330 U.S. 731, 734 (1947).

The case of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), as developed in subsequent opinions such as *Gillespie, supra,* and *Local No. 438 Construction & General Laborers* v. *Curry,* 371 U.S. 542, 548-50 (1963), establishes the appealability of orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." This has come to be denominated the "collateral order" doctrine. See 9 Moore's Federal Practice, ¶110.12 at p. 150. It is, of course, the practical effect and not the surface appearance of the particular order from which the appeal is taken that is the determining factor and the order appealed from need be neither the final, i.e. last, order in the case nor a "final" decision in a technical sense. *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 153 (1964).

As applied to plaintiff class action determinations, there evolved the so-called "death knell" refinement of the "collateral order" doctrine. *Graci* v. *United States,* 472 F.2d 124, 126 (5th Cir. 1973). The "death knell" doctrine was first enunciated by the Second Circuit in *Eisen* v. *Carlisle & Jacquelin,* 370 F.2d 119 (2nd Cir. 1966), as a logical application of the collateral order doctrine. The death knell doctrine was simply stated in *Eisen,* at p. 121, as follows:

> "Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly situated, for, as we have already noted, it will for all practical purposes terminate the litigation. *Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed.*" (Emphasis supplied.)

In reaching its conclusion, the court observed at p. 120:

> "The alternatives are to appeal now or to end the lawsuit for all practical purposes. Judge Tyler's order 'if unreviewed, will put an end to the action'. . . . We can safely assume that no lawyer of competence is going to recover $70 for Mr. Eisen. . . . If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23."

In other words, if the denial of plaintiff class status will result in the practical termination of the lawsuit because the individual claim asserted is of such small monetary significance, then appeal from such an order will lie. As explained in footnote 3 in *Falk* v. *Dempsey-Tegeler & Co., Inc.,* 472 F.2d 142, 143 (9th Cir. 1972):

"Where an order of a District Court denying class action treatment would terminate the individual claim of the plaintiff, and in effect sound the 'death knell' for his action, the decisions of the Second Circuit permit review. *Green* v. *Wolf Corporation*, 406 F.2d 291 (2nd Cir. 1968); *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2nd Cir. 1966). Where, by reason of the dollar amount at stake or otherwise, plaintiff's claim retains its vitality despite the denial of class action status, the order is not subject to review under 28 U.S.C. §1291 (1970); *Caceres* v. *International Air Transport Association*, 422 F.2d 141 (2nd Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corporation*, 410 F.2d 295 (2nd Cir. 1969)."

B. The Conflicting Decisions Of The Circuits.

If the "death knell" doctrine is embraced, then the Court of Appeals will determine the appealability of an order denying class status to the plaintiff by weighing the likelihood of effective prosecution of the individual claims asserted by the named class representatives, i.e., does the named individual plaintiff have enough at stake so that it is reasonable to expect him to proceed with the rigors of the trial on the merits, and to do so in an effective manner.

There follows an enumeration of the reported decisions in which the death knell doctrine has been approved and applied by various courts. In many of these cases the reviewing court by application of the death knell doctrine found that the amount at stake for the named plaintiffs was large enough so as to make it appear probable that the case would be competently tried even though class action status were denied. There is little doubt that had only $12 been involved, these courts would

have allowed the appeal and decided the propriety of the class order, as becomes apparent from the information as to the size of the individual claim noted after the citation.

(i) Second Circuit:

Eisen v. *Carlisle & Jacquelin*, 370 F.2d 119 (1966), *cert. den.*, 386 U.S. 1035 (1967) ($70)* (appeal allowed)

Green v. *Wolf Corp.*, 406 F.2d 291, 295 (1968) (less than $1,000) (appeal allowed)

City of New York v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 298-9 (1969)

Caceres v. *International Air Transport Association*, 422 F.2d 141 (1970) (approximately $150,000 on average)

Milberg v. *Western Pacific Railway Co.*, 443 F. 2d 1301 (1971) ($8,500)

Korn v. *Franchard Corp.*, 443 F.2d 1301, 1304-06 (1971) ($386) (appeal allowed)

Weight Watchers of Philadelphia, Inc. v. *Weight Watchers International, Inc.*, 455 F.2d 770, 772-3 (1972) (approximately $150,000 on average)

Lerman v. *Tenney*, 459 F.2d 482 (1972) (appeal allowed)

Eisen v. *Carlisle & Jacquelin*, ... F.2d ....., CCH Fed. Sec. L. Rep. ¶93,963 (May 1, 1973), rehearing den. ¶93,999 ($70)

(ii) Fifth Circuit:

Gosa v. *Securities Investment Company*, 449 F. 2d 1330 (1971) ($3,322)

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* The amount involved in the plaintiff's individual claim, if discernible from the opinion or if known to counsel, is noted following the citation.

Miller v. *Mackey International, Inc.*, 452 F.2d 424, 427, fn. 3 (1971) (appeal allowed)
Songy v. *Costal Chemical Corporation*, 469 F.2d 709 (1972)
Graci v. *United States*, 472 F.2d 124, 126 (1973) ($78,700)

(iii) Ninth Circuit:
Weingartner v. *Union Oil Co.*, 431 F.2d 26 (1970) ($23,580 average in Count I; $34,800 average in Count II)
Falk v. *Dempsey-Tegeler & Co., Inc.*, 472 F.2d 142, 143 (1972) ($14,125)

See also *Yaffe* v. *Powers*, 454 F.2d 1362 (1st Cir. 1972), in which appeal of an order denying plaintiff class status was permitted under 28 U.S.C. §1292(a)(i) as a denial of a motion seeking injunctive relief.

As to circuits which reject the "death knell" doctrine, or deny appealability of class action orders under the collateral order doctrine, see:

(iv) Third Circuit:
Hackett v. *General Host Corp.*, 455 F.2d 618 (1972), *cert. den.*, 407 U.S. 925 (1972) ($6)

(v) Seventh Circuit:
King v. *Kansas City Southern Industries, Inc.*, No. 72-1734 (June 12, 1973) (A. 7.) ($60)
Winokur, et al. v. *Bell Federal Savings & Loan Association, et al.* (May 18, 1973) (A. 1.) ($12)

It is worth noting that the *Hackett* decision, which the Seventh Circuit chose to follow here, was decided by a divided court, over a perceptive and eloquent dissent by

Justice Rosenn. Furthermore, the result reached by the majority in *Hackett* was strongly influenced by the fact that the statute under which the action was brought, unlike the statute in *Eisen* or in this case, expressly authorized the award of attorneys fees to a successful plaintiff.* The presence of this factor may well have played a role in this Court's denial of certiorari in *Hackett,* for it served to blur the conflict with *Eisen.* Also, the Third Circuit appears to have been swayed by the enormity of the size of the class. Finally, a careful reading of the majority opinion in *Hackett* makes it plain that the Court was also influenced by its belief that the Second Circuit had substantially retreated from its original position in *Eisen.* (See 455 F. 2d, at pp. 621-22). That belief, however, was not correct. In a subsequent opinion in the *Eisen* litigation, (..... F.2d .....; CCH Fed. Sec. L. Rep. ¶93,963, *rehearing den.,* ¶93,999 (2nd Cir. 1973), the Second Circuit went considerably out of its way to reaffirm its whole hearted adherence to the "death knell" doctrine.

II.

REJECTION OF THE COLLATERAL ORDER OR DEATH KNELL DOCTRINES SEVERELY HAMPERS ENFORCEMENT OF THE FEDERAL SECURITIES LAWS AND WILL HAVE WIDE PUBLIC IMPACT.

To a significant degree, enforcement of the Federal securities laws, especially in the antifraud and proxy vio-

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* Unlike other statutes (e.g., the Securities Act of 1933 and the Clayton Act and other sections of the Securities Exchange Act of 1934, e.g., §§ 9 and 18), §10(b), the substantive basis for the case at bar, does not provide for imposition of attorneys' fees against defendants if plaintiffs are successful.

lation areas, is in the hands of "private attorneys general" in quest of "corporate therapeutics." This Court appears consistently to have favored the right of securities holders to enforce the private rights of action granted by or implied from the Securities Exchange Act of 1934 as a means to enforce compliance with that statute. *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). See also *S.E.C.* v. *National Securities, Inc.*, 393 U.S. 453 (1969) and *S.E.C.* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

Such expressions of a right certainly imply that effective remedies to correct the alleged wrongs exist. See *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); and *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

In many securities cases which involve publicly held securities the amount of individual damage is small and becomes significant in an economic sense only in the aggregate. In such cases there comes into play the class action provisions of Rule 23, F.R.C.P. As explained by the reporter for the Advisory Committee that drafted new Rule 23, F.R.C.P., Professor Benjamin Kaplan, the "historic mission" of the class action is "taking care of the small guy." Quoted in Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L. J. 295, 299 (1966). This statement confirms that the underlying purpose of new Rule 23 is to serve as a vehicle for redressing wrongs of small claimants—wrongs which in the absence of the class action device would go unremedied.

Escott v. *Barchris Construction Corporation,* 340 F.2d 731, 733 (2nd Cir. 1965), *cert. den.* 382 U.S. 816 (1965). Rare indeed would be the claimant who, but for the class device, would prosecute a suit for $10, $20 or $30 of lost dividends. Few lawyers would undertake such a case. It is only by the aggregation of many small claims that the wrong can be vindicated. See also *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555, 560 (2nd Cir. 1968); *Hohmann* v. *Packard Instrument Company, Inc.,* 399 F.2d 711 (7th Cir. 1968); *Weeks* v. *Bareco Oil Co.,* 125 F.2d 84 (7th Cir. 1941), and the authorities collected in *Berland* v. *Mack,* 48 F.R.D. 121 (S.D.N.Y. 1969).

This Court continues to recognize that the class action device permits citizens "to combine their limited resources to achieve a more powerful litigation posture." *Hawaii* v. *Standard Oil Co. of California,* 405 U.S. 251, 92 S. Ct. 885, 893, 895 n. 4 (1972). See also *Surowitz* v. *Hilton Hotels Corp.,* 383 U.S. 363 (1966), in which at p. 373 the Court, in a derivative suit, observed that old Rule 23(b), F.R.C.P. was to be read "to further, not defeat the ends of justice" and to assist in the protection of small investors.

It cannot reasonably be assumed that this $12 case will be prosecuted by any lawyer "worth his salt." Denial of appealability of the lower court's order effectively destroys the substantive claim. See *Eisen,* at p. 9, *supra.* This is so since even if the plaintiff should elect to try a $12 case, it simply cannot be prepared with the same resources that a $1,000,000 case warrants, and the likelihood of loss on the merits is extremely high. Irrespective of how the Court of Appeals views the class action issue in an appeal taken *after* trial, the merit deter-

mination by the lower court will probably not be reversed.

It is important, of course, that these claims be enforced so that the securities laws do not become empty legislative gestures. As stated by Circuit Judge Alfred Goodwin in *LaMar* v. *H & B Novelty and Loan Company*, 55 F.R.D. 22, 24 (D. Ore. 1972):

> "One important function of the class action is to afford meaningful rights to persons who may be ignorant of such rights . . . or to those whose individual claims are to small to support custom-tailored litigation. . . . If the Rule is to be effective, the courts should not restrict class membership by narrow and grudging rules. Unduly restrictive limitations upon the class may have the effect of denying legal remedies to the ignorant and the poor while creating windfall immunities for law violators." (references omitted)

Thus, it is only the aggregation of many small claims which permits redress. Without such combining of forces the prosecution of the alleged wrongdoers is crippled. The interdependence of the class device and Rule 10-(b)5 actions is especially strong, and the diminution of one necessarily diminishes the use of the other. See, The Impact of Class Actions on Rule 10(b)5, 38 U. Chi. L. Rev. 337 (1971); Hazard, The Effect of the Class Action Device Upon Substantive Law, 58 F.R.D. 307 (1973).

CONCLUSION.

The Courts of Appeal await guidance on this subject and "hope that this issue will be settled by the highest authority." *Lerman* v. *Tenney*, 459 F.2d 482 (2nd Cir. 1972). This Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review its order dated May 18, 1973.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 18, 1973.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

EDWARD Q. LUPIA, Etc.,
Plaintiff(s)-Appellant,
No. 73-1026 vs.
STELLA D'ORO BISCUIT CO., INC.,
Defendant-Appellee.

FRANK A. GARZA, Etc.,
Plaintiff-Appellant,
No. 73-1012 vs.
CHICAGO HEALTH CLUBS, INC., et al.,
Defendant-Appellees.

MARSHALL WINOKUR, et al.,
Plaintiffs-Appellants,
No. 72-2029 vs.
BELL SAVINGS & LOAN ASSOCIATION, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 738
Philip W. Tone,
Judge
No. 71 C 643
Richard W. McLaren
Judge
No. 70 C 1177
William J. Bauer,
Judge

ORDER

These three cases involve the much disputed question whether the dismissal of a class action portion of a complaint is appealable. In *Thill Securities Corp.* v. *New*

York Stock Exchange, 469 F.2d 14, 17 (7th Cir. 1972), we held that the denial of a motion to strike a class action was not an appealable order under 28 U.S.C. § 1291. We now hold that the present orders are not appealable, necessitating the dismissal of the three appeals for lack of jurisdiction.

In so holding, we follow *Hackett* v. *General Host Corp.,* 455 F.2d 618 (3d Cir. 1972), certiorari denied, 407 U.S. 925; *Gerstle* v. *Continental Airlines, Inc.,* 466 F.2d 1374 (10th Cir. 1972); and our analogous prior decision in *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945). If the interlocutory appeals route of 28 U.S.C. § 1292(b) had been successfully followed, review would be available. 9 Moore's Federal Practice ¶ 110.13[9] p. 184 (2d ed. 1972).

Appeals dismissed.

MEMORANDUM OPINION AND ORDER

Bauer, District Judge.

This cause comes on defendants' motion pursuant to Rule 23(c) of the Federal Rules of Civil Procedure for an order denying the right to maintain this cause as a class action as to plaintiffs. This Court previously ruled on March 27, 1972 that a class action as to the defendants could not be maintained in this suit.

The named plaintiffs Marshall and Rae Winokur are holders of a savings account issued by defendant Bell Federal Savings and Loan Association (hereinafter referred to as "Bell"); Abe and Celia Brodsky, at all times relevant to this suit, were holders of a savings account issued by defendant Home Federal Savings (hereinafter referred to as "Home"); and plaintiffs Ethelle and Bertha Katz, at all times relevant to this suit, were holders of a savings account issued by Uptown Federal Sav ings and Loan Association of Chicago (hereinafter referred to as "Uptown"). Bell, Home and Uptown, all federally chartered savings and loan associations, are authorized by statute[1] to raise capital by the sale of savings accounts to the public.

The complaint alleges that plaintiffs are purchasers and/or sellers of securities and that the defendants have made and are continuing to make misstatements and omissions of material fact in connection with such purchases and sales in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10(b)(5) of the Rules of the Securities and Exchange Commission,

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[1] 12 U.S.C. § 1464.

17 C.F.R. § 240.10b-5. More specifically, plaintiffs allege the following misleading statements:

1. "The defendants falsely advertise that the dividends paid by them are the equivalent of interest compounded daily. . . ." [This is alleged to be a misstatement because if a depositor withdraws prior to the last day in any calendar quarter, he is paid no dividends at all on the withdrawn funds for that quarter.]

2. "The defendants omit to state that no dividend at all is paid for the balance of a calendar month in which a deposit is made subsequent to the 10th day of that month." [This is alleged to be misleading because defendants advertise that "all savings in by the 10th earn from the 1st" and omit to mention that deposits made after the 10th of the month do not earn interest until the first of the following month.]

Jurisdiction is alleged under 15 U.S.C. § 78aa. At this time, the Court need not consider the propriety of jurisdiction under this section.

Plaintiffs seek to bring this suit as a class action under Rule 23 on behalf of all persons who have withdrawn or deposited money in Bell, Home, and Uptown and who have thereby suffered loss in that they "(i) withdrew funds prior to the end of a calendar quarter and did not receive dividends equivalent to interest compounded daily, or (ii) deposited funds after the 10th day and prior to the end of the month and received no dividends at all for this period."

Plaintiffs contend that they meet the requirements of Rule 23, directing the main thrust of their arguments to the propositions that: (1) they are representative of the plaintiff class they seek to represent; (2) there are questions of law and fact common to the class and that these questions "predominate over questions affecting only individual members"; and (3) such a class action is manageable because where a Rule 10(b)(5) violation is alleged reliance by each member of the class on the misrepresentation need not be shown, but rather merely the materiality of the misrepresentation must be shown.

Defendants contend that the requirements of Rule 23 have not been satisfied because, *inter alia*, the individual plaintiffs are not representative of the class on whose behalf they are suing. Defendants further contend that numerous individual questions are raised by this action, that consequently common issues do not predominate, and that the class action would be an unmanageable rather than a superior means of adjudicating this controversy. Defendants also take the position that an individual does not have a claim for a misleading statement under Rule 10(b)(5) unless the individual relied on the statement to his detriment.

The arguments presented by the plaintiffs are unpersuasive; thus, this Court finds that the requirements for a Rule 23 class action have not been satisfied.

REQUIREMENTS FOR THE MAINTENANCE OF A CLASS ACTION

In order for a class action to be the proper mechanism for adjudicating a controversy, the following requirements for Rule 23(a) must all be satisfied:

1. the class must be so numerous that joinder of all members would be impracticable;
2. there must be questions of law or fact common to the class;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. the representative parties must fairly and adequately protect the interests of the class.

In addition, one of the provisions of Rule 23(b) must also be satisfied. This Court is of the opinion that the purported class of plaintiffs does not meet at least two of the four prerequisites of Rule 23(a).

THE CLAIMS OF THE REPRESENTATIVE PARTIES ARE NOT TYPICAL OF THE CLAIMS OF THE CLASS

In *Jacobs* v. *Paul Hardeman, Inc.*, 42 F.R.D. 595 (S.D. N.Y.1967), plaintiffs sought on behalf of a class of "all present and former debenture holders similarly situated" the rescission of individual purchases of debentures and damages for alleged misrepresentations in and omissions of material facts from a registration statement and prospectus. The court dismissed the class action aspect of the complaint on grounds that:

> ". . . while there are probably some questions of law and fact common to some of the purchase transactions, this . . . is certainly not true as to all." 42 F.R.D. at 598.

The court held that the requirements of 23(a)(3) and (4) had not been complied with because the named plain-

tiffs had purchased stock from underwriters on the basis of a prospectus and registration statement while other members of the class had later purchased in the open market after various information about the company's financial reverses had been publicized. The court in dismissing the class action concluded that the claims of the named plaintiffs would not be typical of those of the later purchasers, that their factual and legal positions were significantly different, and thus that the later purchasers would not be fairly and adequately represented.

It is the opinion of this Court that the questions of fact subject to determination in this cause will be almost as numerous as the members of the plaintiffs' class and that there are potentially as many classes as depositors. This situation is caused by the fact that different representations have been made to every member of the class. Where there is an attempt to bring a class action based on an alleged 10(b)(5) violation, there must be a material misrepresentation which is common to the class. *Jacobs* v. *Paul Hardeman, supra.* It is clear from the pleadings that each individual defendant utilized a different advertisement which would be relevant only to claims made by its own customers. Thus, contrary to the contentions of the plaintiff, there are at least three major groupings within the class to whom varied representations have been made. Further, it is also clear from the pleadings that many, if not most, customers of these savings and loan associations open their accounts in person at the office of the association and are fully advised at that time of the various types of accounts offered, as well as the rules, regulations and terms pertaining to each type of account—including the

rate and basis of computing interest. Many other individual depositors received the same information by phone or letter. Additionally, the passbook or certificate given to the depositor generally contains this information. Thus, information that was not contained in the plaintiffs' advertisements was in fact available and known to many depositors before funds were committed.[2] In each of these situations, there were different representations made by different individuals which would affect the materiality of the "misrepresentations".

It is the opinion of this Court that there are factual questions essential to the claim of each member of the class (as defined by plaintiff) which cannot be answered within the framework of a class action. This Court further believes that it would be impossible without a hearing on the claim of each individual member of the class to determine which depositors of defendant savings and loan associations are in fact members of the class. It would be necessary to determine (1) what type of account

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[2] The Court in *Kohler* v. *Kohler Co.*, 319 F.2d 634 (7th Cir. 1963) ruled that defendants are obliged to disclose to plaintiffs only those material facts which are reasonably believed to be unknown to the plaintiff. In *City National Bank of Fort Smith, Arkansas* v. *Vanderboom*, 422 F.2d 221, 231 (8th Cir. 1970) the Court noted that the Seventh Circuit had held in *Kohler* that:

> ". . . the failure of [defendant] to disclose material facts to the plaintiff will not lead to liability under 10b-5 where the plaintiff himself has the ability and opportunity to discover those facts easily."

Recent cases similar to the one at Bar have held that defendants are not required to say that which has been publicly proclaimed in several different ways on several different occasions. *Johnson* v. *Wiggs*, 443 F.2d 803 (5th Cir. 1971); *Mitchell* v. *Texas Gulf Sulphur Co.*, 446 F.2d 90 (10th Cir. 1971), cert. denied, 404 U.S. 1004, 92 S.Ct. 564, 30 L.Ed.2d 558 (1971); *Hafner* v. *Forest Laboratories, Inc.*, 345 F.2d 167 (2d Cir. 1965); *Phillips* v. *Reynolds and Co.*, 294 F.Supp. 1249 (E.D.Pa.1969).

an individual had and whether it was subject to the claims raised by plaintiffs; (2) whether each alleged member of the class had, in fact, read the advertisements complained of and had been misled by any of the alleged misrepresentations contained therein; and (3) whether representations of the interest policy had been made to him orally or whether he had read a statement of the interest policy contained in his passbook or in the association's charter which would counter the advertisements complained of. Answers to all of the above questions are essential to determine whether there have been "material misrepresentations".

Because of the above factors, the question of whether or not there has been a material misrepresentation is not a question common to the class but rather is a question to be answered by each individual member of the class. Thus, as in the *Jacobs* case, the claims of the named plaintiffs are not typical of those of all depositors in Bell, Home or Uptown who are alleged to be members of the class, since individual factual situations of each class member may vary significantly. In addition to the variance of claims as between named and unnamed plaintiffs, already two of the six named plaintiffs have presented a claim which is not typical of the original claim presented on behalf of the class.[3]

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[3] The discovery process elicited the fact that neither Abe nor Celia Brodsky had made any deposits after the 10th of the month. Further, despite advertisements which were allegedly misleading, both Abe and Celia admitted during a deposition that they knew the interest policy of Home Federal Savings and had never relied on the allegedly misleading advertisement. The Brodskys, *qua* named plaintiffs, seek to represent all persons misled by the Home advertisement. However, the facts as disclosed by depositions reveal that the Brodskys themselves are not members of

The Advisory Committee Notes to Rule 23 state:

> ". . . [On] the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed."

In line with this position, courts have denied class actions in suits involving 10(b)(5) violations because of varying misrepresentations and the consequent absence of significant questions of fact common to all members of the putative class.[4]

It is this Court's opinion that the plaintiffs cannot maintain a class action because they have not met the requirements of Rule 23(a). Thus, this Court need not decide whether the plaintiffs in their quest for a class action have met the requirements of Rule 23(b) or whether reliance is still an essential element of 10(b)(5) action.

Accordingly, it is hereby ordered that defendants' motion to disallow the maintenance of the instant action as a class action is granted.

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the class which they seek to represent. These facts indicate not only that the Brodskys may encounter difficulty in successfully bringing this claim but also that the claims of individual named plaintiffs are not typical even among themselves.

[4] *Morris* v. *Burchard*, 5 F.R.D. 530 (S.D. N.Y. 1971); *Moscarelli* v. *Stamm*, 288 F.Supp. 453 (E.D.N.Y.1968)

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1972 — APRIL SESSION, 1973

No. 72-1734

JORDAN JAY KING, et al.,
Plaintiffs-Appellants,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 C 2141
Hubert L. Will, Judge.

ARGUED JUNE 12, 1973 — DECIDED JUNE 12, 1973

Before PELL and STEVENS, *Circuit Judges,* and ESCHBACH, *District Judge.**

PER CURIAM. This is an appeal by a group of plaintiffs in only one of six consolidated cases pending in the district court. In the instant case, the district court on June 22, 1972, entered its order denying plaintiffs' motion to have this action designated as a class action. Plaintiffs filed their notice of appeal to this court from that order and concede that they base their right of appeal, if any, on 28 U.S.C. §1291.

* Honorable Jesse E. Eschbach is sitting by designation from the United States District Court for the Northern District of Indiana.

Defendant-appellee Kansas City Southern Industries, Inc., has filed its motion to dimiss the appeal for the reason that the order below was an interlocutory order not appealable under 28 U.S.C. §1291. We agree.

The question before the court on the motion to dismiss involves a much disputed question as to whether the dismissal of a class action portion of a complaint is appealable. In *Thill Securities Corp.* v. *New York Stock Exchange,* 469 F.2d 14, 17 (7th Cir. 1972), this court held that the denial of a motion to strike a class action was not an appealable order under 28 U.S.C. §1291. We now hold that the present order is not appealable under §1291, necessitating the dismissal of the appeal for lack of jurisdiction.

In so holding, we follow *Hackett* v. *General Host Corp.,* 455 F.2d 618 (3d Cir. 1972), *cert. denied,* 407 U.S. 925; *Gerstle* v. *Continental Airlines, Inc.,* 466 F.2d 1374 (10th Cir. 1972); and our analogous prior decision in *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945). We decline to adopt and accordingly reject the so-called "death knell" theory originally enunciated in *Eisen* v. *Carlisle & Jacquelin,* 370 F.2d 119 (2d Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967). Likewise we do not find the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), applicable to the type of order here involved.

On June 11, 1973, the plaintiffs below purported to secure an order from the district court amending, on a nunc pro tunc basis, the order of June 22, 1972, which amended order would have permitted, pursuant to 28 U.S.C. §1292(b), an appeal on the class action status

as involving a controlling question of law as to which there is a substantial ground for difference of opinion. Our present disposition does not reach the issues raised by that action and we express no opinion as to whether the power existed in the district court to amend its previous order on a nunc pro tunc basis while an appeal was pending in this court, nor do we express an opinion as to whether this court in its discretion should permit an appeal to be taken from such order in the event it was properly entered below.

APPEAL DISMISSED.

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In The

Supreme Court of the United States

October Term, 1973

No. 73-381

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ,

Plaintiffs-Appellants-Petitioners,

vs.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Defendants-Appellees-Respondents.

ANSWER OPPOSING CERTIORARI

QUESTION PRESENTED.

Whether an order striking class allegations from a complaint is appealable as of right after a trial court refuses to certify the order because: discovery is virtually complete; all significant issues in the case have been briefed; almost all relevant facts are admitted; the entire case can be tried to final judgment in a matter of days (or even hours); and an interim appeal would therefore substantially delay termination of the litigation.

STATEMENT OF THE CASE.

Plaintiffs seek to represent all depositors of Home Federal Savings and Loan Association of Chicago ("Home") supposedly misled by Home advertisements. The complaint alleges the advertisements were misleading because they did not state: (1) that deposits made after the tenth of a month ("late deposits") do not begin to earn interest until the first day of the following month; and (2) that savings withdrawn before the end of a calendar quarter ("early withdrawals") do not earn interest for the calendar quarter. The parties agree on the dates, contents, and source of all alleged advertisements. They agree that the named plaintiffs made certain deposits and withdrawals on certain dates.

Defendant Home answered that plaintiffs have no cause of action on "late deposits" because every Home passbook* includes a one page statement of "conditions" which provides in pertinent part:

> Funds received on or before the [10th] [15th] of any month receive earnings for the entire month. Funds received after the [10th] [15th] receive *earnings from the first of the following month.* (Emphasis added.)

Plaintiffs admit that this language appears in every Home passbook. They further admit that currently published passbooks use "10th" and older passbooks use "15th" due to an intervening change in federal regulations and Home's charter. Plaintiffs also admit that

* Plaintiffs rely on the rule that a passbook account is a security.

they personally knew that the 10th of the month was the "determination date" during the period covered by the complaint. Finally, no named plaintiff ever made a "late deposit" in Home during the relevant limitations period.

Defendant Home further answered that plaintiffs have no cause of action on "early withdrawals" because depositors who attempt to make "early withdrawals" are advised of the opportunity to use passbook loans to avoid loss of interest, and because Home's charter clearly provided during the period of the complaint that interest would be paid quarterly. Plaintiffs did not dispute the provisions of Home's charter and admitted that they had personally been advised of the procedures for passbook loans. The only named plaintiff who deposited money in Home after reading a Home advertisement admitted under oath that she "knew if you took money out of your account before the end of the quarter . . . that you would lose interest on it." (Appellate record at 723-724)

The primary issue left for decision by the District Court thus was Home's defense that its prior disclosures barred plaintiffs' cause of action. This defense was based on *Kohler* v. *Kohler Co.,* 319 F. 2d 634 (7th Cir. 1963) and the cases collected in Annot., 22 ALR 3d 793 and footnote 2 of the district court opinion herein, A-8. All those authorities hold that a defendant has no obligation to repeat or emphasize information which has already adequately been disclosed or made accessible to a plaintiff in other ways. This issue was fully briefed by all parties and would easily and promptly have been decided by the district court but for this appeal. (Briefs comprised over 100 pages of the record on appeal.)

Plaintiffs originally sought discovery from Home concerning deposits and withdrawals by alleged class members. Discovery on these matters was deferred until the court determined whether or not a class action would lie. Now that the class action has been disallowed, such discovery is unnecessary.

For these reasons, the trial court ruled that it made no sense to allow an interim appeal. When plaintiffs sought certification under 28 U.S.C. §1292(b), the district judge held:

> Section 1292(b) . . . authorizes an immediate appeal . . . where such an appeal will materially advance the ultimate termination of the litigation. Here an immediate appeal will materially delay final termination of the litigation. The case as it now stands is virtually set for trial. Discovery, for all practical purposes, is complete. The remaining factual issues are largely uncontested and the remaining legal issues have been partially briefed. Thus an appeal in this case would delay rather than materially advance the ultimate termination of the litigation.

REASONS FOR DENYING THE WRIT.

I. THE ISSUE IS NOT RIPE FOR REVIEW BECAUSE THE LAW IS STILL IN FLUX ON THE CIRCUIT COURT LEVEL.

Six circuits have considered the appealability of orders striking class allegations. The Tenth Circuit, Third Circuit, and Seventh Circuit have squarely and unequivocally held that such orders are not "final judgments" and therefore cannot be appealed as of right under 28 U.S.C. 1291. (A-2, A-12.) All three circuits recognize that appropriate interim appeals can be taken under Rule 54(b) and 28 U.S.C. 1292(b).

The Second Circuit has gone far beyond any other circuit in permitting interim class action appeals. In its original opinion in *Eisen* v. *Carlisle & Jacquelin,* 370 F. 2d 119 (2d Cir. 1966), it created the "death knell" doctrine which allowed a plaintiff with a small individual claim to appeal dismissal of a class allegation which made prosecution of the individual claim uneconomic. In its third opinion in the same case, *Eisen* v. *Carlisle & Jacquelin,* CCH Fed. Sec. L. Rptr., ¶93,963 (1973), the Second Circuit allowed a defendant to take an interim appeal though the "death knell" rationale is obviously not applicable to a defendant.

In addition to these two disparate views on interim class action appeals, other panels within the Second Circuit have expressed disagreement with the basic approach of the *Eisen* cases. *Caceres* v. *International Air Transport Association,* 442 F.2d 141, 143 (2d Cir. 1970) argued

persuasively that the history of new Rule 23, F. R. Civ. P., showed that draftsmen of that Rule did not think that orders striking class allegations were appealable. In *Korn* v. *Franchard Corp.*, 443 F. 2d 1301 (1970), the majority opinion was critical of the *Eisen* doctrine (*id.* 1303-1306), and Judge Friendly's concurring opinion suggested that the doctrine should be reconsidered *en banc. Id.* 1307.

In addition to these post-*Eisen* cases, earlier Second Circuit cases held that an "order striking the allegations of a class action is *certainly* not appealable," *Lipsett* v. *United States*, 359 F.2d 956, 960 (2d Cir. April 1966), and that "the nonappealability of the order [striking class allegations] is *apparent.*" *All American Airways* v. *Elderd*, 209 F.2d 247, 249 (2d Cir. 1954). In *Weight Watchers of Philadelphia* v. *Weight Watchers International*, 455 F.2d 770 (2d Cir. 1972) and *Pfizer, Inc.* v. *Lord*, 449 F.2d 119, 120 (2d Cir. 1972), Second Circuit panels treated as unthinkably improper requests to appeal other interim class action rulings. The rationales of those cases are fully applicable in the "death knell" context.

Besides these conflicts within the Second Circuit, the Fifth and Ninth Circuits do not fully agree with the *Eisen* theory. In *Gosa* v. *Securities Investment Co.*, 449 F. 2d 1320 (1970), the Fifth Circuit refused to let a plaintiff appeal partly because he failed to present a sufficient record on "such matters as: how much expense should reasonably be anticipated in carrying the cause to completion; whether the degree of solvency of the named party would assure at least the payment of court costs and basic litigation expense; the likelihood of a recovery which would include attorneys fees, either directly or on a contingent basis; or the potential amounts of the claims of other class members." The Fifth Circuit explained:

> If the plaintiff wished to assert that what was otherwise *a purely interlocutory ruling* was efficiently converted by the practical circumstances of the matter to an extinction of the very right to litigate, the plaintiff had the burden of developing these facts before the trial forum.

The Second Circuit has never required such a detailed record. (No such record was made in the instant case).

The Ninth Circuit has noted the Second Circuit's "qualms about the 'death knell' doctrine" in a way that suggests that it may have similar qualms. *Falk* v. *Dempsey-Tegeler & Co., Inc.*, 472 F. 2d 142, n. 3 (1972).

If this Court were to take this case under the present state of the law, it would have to consider not one debatable rule but several amorphous variations of the same debatable rule. With the law in this developing and embryonic state, the issue is not ripe for this Court's consideration.

II. THE INSTANT CASE IS PARTICULARLY UNSUITABLE FOR CERTIORARI.

Even if the law were ripe for consideration by the Supreme Court, the instant case is the last case which this Court would want to take. The recent opinion in *Eisen* v. *Carlisle and Jacquelin* considered numerous major issues now facing the class action bar. It carried the "death knell" doctrine to its illogical extreme by allowing defendants to appeal interim class action rulings. Thus, granting a petition for certiorari in the *Eisen* case would permit this Court to consider the "death knell" doctrine as developed and defended by its perpetrator (the Second Circuit) at the same time the Court decided other issues of general importance.

Unlike the *Eisen* case, the instant case involves no detailed opinion, but a one-page order. Unlike the *Eisen* case, the judgment of the appellate court here does not consider any other significant (or even insignificant) issue.

Moreover, and signally, the factual situation in this case does not raise the "death knell" issue crisply or clearly. The district court refused to certify an interim appeal under 28 U.S.C. 1292(b) because all the issues here had been extensively briefed, almost all facts were admitted, discovery was virtually complete, and the case could be terminated in a matter of days. Thus, even under the *Eisen* rule, dismissal of plaintiffs' appeal did not sound the "death knell" of their case. Plaintiffs could easily have prosecuted this matter to a true final appealable judgment. Under the Fifth Circuit version of the "death knell" rule, quoted above, the appeal here could have been dismissed just for its inadequate record on the "death knell" issue.

A further element in this case that makes certiorari inappropriate is that defendants are savings and loan associations. Although they are confident that they will eventually win this case on the merits, they are equally confident that a notice sent to their former and present depositors, alleging fraud by defendants, would do irreparable damage to defendants' reputation and business, *without regard to the merits of the case.* Accordingly, defendants have urged from the beginning that the merits of the case be tried before any notice is sent to alleged class members. Although the district court did not rule on this issue because of its other rulings against plaintiffs, the potential hardship to defendants is a further reason for this Court to leave this case in status quo.

Conversely, denying certiorari here works no hardship on petitioners. They can bring about a consummated "final judgment" here for less than the cost of writing and printing Supreme Court briefs, flying from Chicago to Washington, preparing an oral argument, etc. (Contrast this situation to that in *Eisen* where a notice to the class and trial of the case would cost over $1 million before an appeal could be heard.) This case has been prosecuted vigorously by plaintiffs' counsel for three years. No harm will result from requiring them to spend a few more days trying the case before initiating an appellate process which itself may occupy a matter of years.

CONCLUSION.

For all these reasons, certiorari should not be granted.

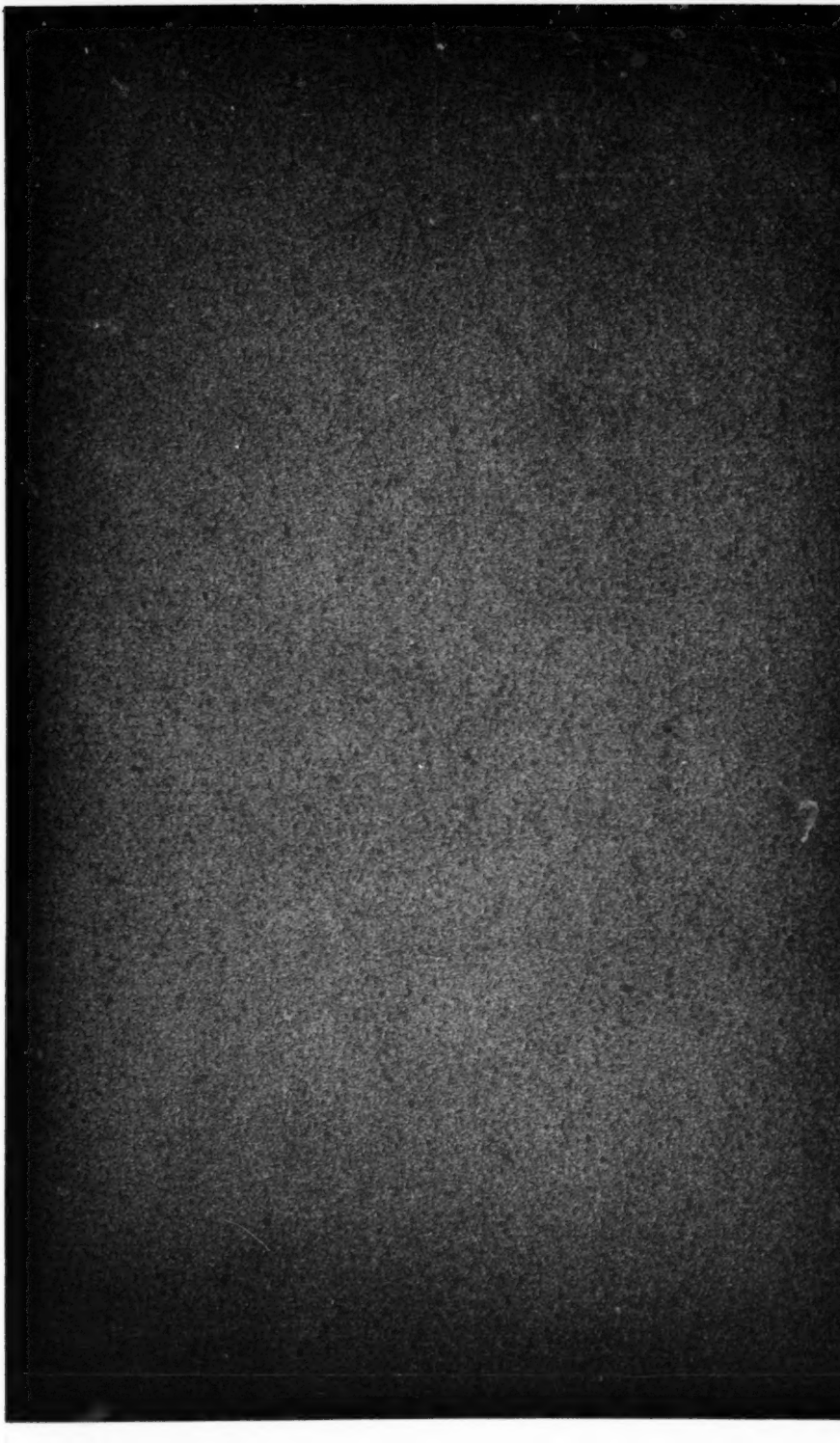
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-381

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ,
Petitioners,

VS.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,
Respondents,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ,

Petitioners,

VS.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Respondents,

REASONS FOR DENYING THE WRIT

THERE ARE NO COMPELLING CONSIDERATIONS REQUIRING THE GRANTING OF THE WRIT OF CERTIORARI IN THIS CAUSE.

Petitioners have not suggested any compelling reasons for the granting of a petition for a writ of certiorari. In *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3rd Cir. 1972), Cert. Den. 407 U.S. 925 (1972), the court dismissed the plaintiff's appeal from the District Court's order denying class action status. The Seventh Circuit made the same determination as in the case at bar, as well as in its subsequent decision in *King* v. *Kansas City Southern Industries, Inc.*, ____ F.2d ____, No. 72-1734 (7th Cir. 1973). The same considerations which resulted in this Court's denying certiorari in *Hackett* are present in the case at bar and are sufficient to deny certiorari herein.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

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No. 73-381

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ,

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vs.

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Respondents.

REPLY OF PETITIONERS

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REPLY OF PETITIONERS

After acknowledging in summary fashion the sharp conflict existing among the Circuits (and even adding the Tenth Circuit to the fray), Respondent Home Federal Savings argues that certiorari should be granted, if at all, in the *Eisen* case, but not in the case at bar. Home argues (Home Brief p. 7) that *Eisen,* by reason of the Second Circuit's detailed opinion and that court's allegedly "illogical[ly] extreme" view on class action appeals, is ripe for

this Court's consideration. It may well be that certiorari ought to be granted in *Eisen,* but that does not bear adversely upon whether Petitioners' case should also be granted review.

In *Eisen* (No. 73-203) the Petitioner is a plaintiff who asserts that the trial court's order *granting* class status to plaintiff is not appealable by defendant. The *Eisen* Petitioner's argument undoubtedly will be that the "death knell" doctrine cannot be used to import finality into an otherwise interlocutory order inasmuch as an order granting class status does not, for all practical purposes, terminate the case,—indeed, the opposite is true since class status permits the case to go forward.

In the case at bar, of course, plaintiff class status was *denied,*—and it is this denial which for all practical purposes terminates the action and thus calls for invocation of the "death knell" doctrine. To argue that certiorari should be granted in *Eisen* and therefore not granted in the instant case is a non-sequiter. The theory of the death knell doctrine is simply not applicable to *Eisen.* If symmetry is deemed desirable in determining whether the death knell doctrine has vitality and the scope of its application, possibly certiorari should be granted in *Eisen* (No. 73-203), *Lupia* v. *Stella D'Oro Biscuit Co., Inc.,* (No. 73-307) and in the case at bar. It is submitted, however, that of the three certiorari petitions now pending before this Court, only the case at bar squarely presents the death knell issue. This is so because of the miniscule amount of money involved in the individual claims (in contrast to the $700,000 constituting the named plaintiff's claim in *Lupia*) and because class action status was here denied (in contrast to *Eisen* where it was granted).

Respondent Home further argues (Home Brief p. 8) that it has special status because of the nature of its business and the harm that notice to the class will inflict upon that business. Aside from the fact that such an argument is directed to the substantive issue as to whether there should be a class action, this argument has already been rejected. *Miller* v. *Mackey International, Inc.*, 452 F.2d 424, 428-29 (5th Cir. 1971).

Respondent Home also seeks to imply that plaintiffs have completed discovery. Such is not the case. At an early stage of this litigation the trial judge, upon defendants' motion, referred this case to the Federal Home Loan Bank Board upon grounds of primary jurisdiction and ordered discovery to be stayed. Prior to the stay order, however, the defendants deposed several of the plaintiffs, including the two plaintiffs having deposits in Home Federal. The Federal Home Loan Bank Board declined jurisdiction approximately a year after the referral, and the case was then again placed on the court's active calendar. Since class status remained undecided at the time the Federal Home Loan Bank Board declined jurisdiction, the plaintiffs could not economically embark upon a discovery program and, of course, the same was true when, finally, plaintiff class status was denied. In any event, plaintiffs have had *no* pretrial discovery.

One last point: Respondent Home sets forth a series of supposed "facts" which the two plaintiffs who were depositors in that savings and loan association (and only those particular plaintiffs) are asserted to have admitted. Lest the Petitioners' silence be construed against them, and out of an abundance of caution, these "facts," which go to the substance of the claim itself, and not to the question of

whether this Court should grant review, are less than accurate as presented. These "facts" are denied by Petitioners and hopefully, after trial, the jury will agree with Petitioners' position.

Respectfully submitted,

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